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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1032

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims is reported at 403 F. 2d 721.

JURISDICTION

The judgment of the Court of Claims was entered November 15, 1968. The petition for certiorari was filed on February 10, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether a bequest by a United States citizen to "the Mayor & Magistratsraete of Fuerth, Bayern, Germany 13a, to be used and expended for the benefit of said city of Fuerth" 1) is deductible from the testator's gross estate under Section 2055(a) of the Internal Revenue Code of 1954, or 2) if not so deductible, is exempt from estate taxation in the United States under Article XI of the German-American Treaty of Friendship, Commerce, and Navigation of October 29, 1954.

STATUTE AND TREATY INVOLVED

Section 2055(a) of the Internal Revenue Code of 1954:

> (a) IN GENERAL.—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers (including the interest which falls into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made before the date prescribed for the filing of the estate tax return)—
>
> (1) to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes;
>
> (2) to or for the use of any corporation organized and operated exclusively for re-

ligious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation;

(3) to a trustee or trustees, or a fraternal society, order or associaton operating under the lodge system, but only if such contributions or gifts are to be used by such trustee or trustees, or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, and no substantial part of the activities of such trustee or trustees, or of such fraternal society, order, or association, is carrying on propaganda, or otherwise attempting, to influence legislation; or

(4) to or for the use of any veterans' organization incorporated by Act of Congress, or of its departments or local chapters or posts, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

For purposes of this subsection, the complete termination before the date prescribed for the filing of the estate tax return of a power to consume, invade, or appropriate property for the benefit of an individual before such power has been exercised by reason of the death of such individual or for any other reason shall be consid-

ered and deemed to be an irrevocable disclaimer with the same full force and effect as though he had filed such irrevocable disclaimer.

(26 U.S.C. 2055)

Article XI of the Treaty of Friendship, Commerce and Navigation of October 29, 1954, between the United States and the Federal Republic of Germany (7 U.S.T. 1839, 1850-1851):

1. Nationals of either Party residing within the territories of the other Party, and nationals and companies of either Party engaged in trade or other gainful pursuit or in scientific, educational, religious or philanthropic activities within the territories of the other Party, shall not be subject to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, within the territories of such other Party, more burdensome than those borne in like situations by nationals and companies of such other Party.

2. With respect to nationals of either Party who are neither resident nor engaged in trade or other gainful pursuit within the territories of the other Party, and with respect to companies of either Party which are not engaged in trade or other gainful pursuit within the territories of the other Party, it shall be the aim of such other Party to apply in general the principle set forth in paragraph 1 of the present Article.

3. Nationals and companies of either Party shall in no case be subject, within the territories of the other Party, to the payment of taxes, fees or charges imposed upon or applied to income,

capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, more burdensome than those borne in like situations by nationals, residents and companies of any third country.

STATEMENT

Richard Wasserman, a citizen of the United States and a resident of Illinois, died in 1959. His will bequeathed the residue of the estate to "the Mayor & Magistratsraete of Fuerth, Bayern, Germany 13a, to be used and expended for the benefit of said city of Fuerth." (Pet. App. 1.)

The City of Fuerth is a municipal corporation of the German State of Bavaria. Under Bavarian law all property acquired by the city may be used and disposed of only as the discharge of municipal functions requires or permits. (Pet. App. 5-6.) The Wasserman bequest has been used by the City of Fuerth for the construction and maintenance of an old people's home for the city's inhabitants. (Pet. App. 1-2.)

The executor paid an estate tax of $86,172.23 and filed a claim for refund on the ground that the value of the bequest, $340,844.86, was a proper deduction from the gross estate. The claim was disallowed and this suit for refund was commenced in the Court of Claims. (Pet. 5.)

The Court of Claims, three judges dissenting, held that the bequest was to the Mayor and Magistratsraete (Council) as trustees for the City of Fuerth (Pet. App. 7) which was not deductible from the gross estate under Section 2055(a)(3) since the bequest

was not exclusively for charitable purposes (Pet. App. 6-11). It also held that Article XI of the Treaty of Friendship, Commerce and Navigation with Germany had no application to the case since the United States estate tax is imposed on the transmission of the estates of United States residents and is not imposed on German legatees. (Pet. App. 11-14.) The Court of Claims denied the executor's motion for summary judgment, granted the motion of the Government and dismissed the suit. (Pet. App. 14.)

ARGUMENT

1. The Court of Claims has correctly decided this case. A taxpayer seeking a deduction must show that he clearly comes within the terms of a statutory provision allowing one. *E.g.*, *Commissioner* v. *Sternberger's Estate*, 348 U.S. 187, 190 n. 3; *New Colonial Co.* v. *Helvering*, 292 U.S. 435, 440. The only estate tax deduction provision that could apply to the bequest in issue here is Section 2055(a). It allows deductions for bequests:

> (1) to or for the use of the United States, any State, Territory, any policital subdivision thereof, or the District of Columbia, for exclusively public purposes;
>
> (2) to or for the use of any corporation organized and operated exclusively for * * * charitable * * * purposes * * *;
>
> (3) to a trustees or trustees * * * but only if such contributions or gifts are to be used * * * exclusively for * * * charitable * * * purposes * * *.

Subsection (1) is the only provision that deals with bequests to political subdivisions, and in terms it limits its deductions to bequests to *domestic* governmental units. The necessary implication of the statutory scheme is that bequests to foreign political subdivisions are not deductible. Congress plainly intended to treat governmental organizations as separate and distinct entities from the corporations and trusts dealt with in subsections (2) and (3), and the only gifts to foreign entities that qualify for deduction are those made to corporations or trusts covered in those subsections.[1] Since the bequest at issue here was to the officials of and for the benefit of the City of Fuerth, it fails to come within the terms of Section 2055(a). Compare *Edwards* v. *Phillips*, 373 F. 2d 616 (C.A. 10), certiorari denied, 389 U.S. 834.

2. There is no conflict with other decisions. In *Schoellkopf* v. *United States*, 124 F. 2d 982 (C.A. 2) (see Pet. 8-10), one issue was whether the settlor of an *inter vivos* trust lost a charitable deduction under the income tax provisions of Section 23(n) of the Revenue Act of 1928, 45 Stat. 791, because of his contingent direction that the trustee pay money to

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[1] Although Congress has in some circumstances allowed and in some denied charitable deductions for donations to foreign private organizations, see Sections 2522(b)(2) and 2522(b)(3) of the 1954 Code, every Code section that allows a deduction for gifts to political subdivisions is expressly limited to gifts to domestic governmental bodies, and this has been the case since at least 1918. See Sections 219(b) and 403 of the Revenue Act of 1918, 40 Stat. 1057 (estate tax); Section 214(a)(11) of the Revenue Act of 1921, 42 State 227 (income tax); and Section 505 (a)(2)(A) of the Revenue Act of 1932, 47 Stat. 169 (gift tax).

two German cities "for charitable, educational and/or benevolent purposes." The court of appeals declined to allow the deduction under Section 23(n)(1), which allowed deductions for gifts to *domestic* political subdivisions for "exclusively public purposes". But, the court did rule for the settlor under Section 23(n)(2), which allowed deductions for gifts to trusts and corporations for "charitable * * * or educational purposes".[2]

The precise basis of the decision is unclear. It would seem, in view of the facts of the case and the language of the statute, that the dispositive fact was that the gift was to be expended by a trust—a recipient expressly named by Section 23(n)(2)—for charitable and other purposes expressly allowed trusts under that statute. Here it could be argued, as the dissenting judge did, that the gift was to trustees; but the better view, we suggest, is as the majority held, that a gift to the mayor and other officials is necessarily to them in their capacities as public officers and is in consequence a gift to the city itself. Furthermore the will at issue in the present case bequeathed a gift that could be put to any use by a foreign city and had no restriction to charitable purposes. Thus the record here does not present the question whether *Schoellkopf* was properly decided.

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[2] Unlike the requirements of Section 170(c)(2) and (3) of the 1954 Code, Section 23(n)(2) of the 1928 Act did not require that the gift be to a domestic corporation or trust. Thus, the income tax provisions of the 1928 Act were much like the estate tax provisions now found in Section 2055(a) of the 1954 Code.

In *In re Sage's Estate*, 122 F. 2d 480 (C.A. 3), another court of appeals case claimed to be in conflict (Pet. 8), the government conceded that the bequest was for specified charitable purposes. The only issue there was whether the amount of the deduction should be reduced by the amount the legatee had paid to compromise a contest of the decedent's will.

Nor is the Court of Claims' opinion here inconsistent (Pet. 8) with its prior decision in *Beggs* v. *United States*, 27 F. Supp. 599. In *Beggs* the question was whether a bequest to an executor which allowed a wide latitude in selecting the recipients, including an open option between Fort Worth, Texas, Vancouver, B.C., and England, was a charitable bequest. The Court held that it was a charitable bequest although the specific legatees were not named in the will. No contributions were actually made to the City of Vancouver or to England (27 F. Supp. at 602), and the Court did not consider whether gifts to them, if required under the will, would be deductible.

There is no conflict with any of the numerous authorities cited on page 10 of the Petition. None of them involve a claimed deduction under Section 2055 for a bequest, as here, to a foreign city without any restriction that it be used for charitable purposes. Three of the cited authorities involve gifts to individual trustees specifically limited to named charitable purposes. *Estate of Boyles* v. *Commissioner*, 4 T.C. 1092; *Koehler* v. *Lewellyn*, 44 F. 2d 654 (W.D. Pa.); Sol. Op. 159, III-1 Cum. Bull. 480. *Holdeen* v. *Ratterree*, 292 F. 2d 338 (C. A. 2), was a case involv-

ing the accumulations of income for 500-1000 years and afterwards a remainder to the State of Pennsylvania. The court's dictum that a trust for a State is charitable is contrary to the decisions of this Court in *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 635-639, 659-660, 668-672, and *United States* v. *Perkins*, 163 U.S. 625.

3. The Court of Claims correctly held that the treaty with Germany is inapplicable here. The treaty precludes the imposition of taxes upon nationals or companies of Germany. The federal estate tax, however, is imposed on the estate of the American decedent, not on the German City of Fuerth. The tax is on the transfer of property at death, and is measured by the value of the property transmitted. (Internal Revenue Code of 1954, Section 2001). The tax is payable out of the estate property by the executor. (Internal Revenue Code of 1954, Section 2002.) Petitioner's contention that Fuerth is being subjected to the payment of the tax because it had "equitable" ownership in the undivided property of the estate and its share was reduced by the tax (Pet. 14-15) was answered in *Maximov* v. *United States*, 373 U.S. 49; *Y.M.C.A.* v. *Davis*, 264 U.S. 47; and *Ithaca Trust Co.* v. *United States*, 279 U.S. 151, 155. See, also, *Brewster* v. *Gage*, 280 U.S. 327, 334.[3]

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[3] The other authorities cited by petitioner as being in conflict deal with general common law rules governing trusts for charitable purposes, and cast no light on the proper interpretation of Section 2055 of the Internal Revenue Code. See IV Scott on *Trusts* (3d ed.), Secs. 368.1 and 373.1; Restatement of

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL 1969.

Trusts, Sec. 373(c); Statute of Charitable Uses, 43 Eliz. 1, c. 4; *City of Aurora* v. *Y.M.C.A.*, 9 Ill. 2d 286, 137 N.E. 347; *Dickenson* v. *City of Anna*, 310 Ill. 222, 141 N.E. 753.

It is not pertinent (see Pet. 14) that Fuerth would have been secondarily liable if the executor had not paid the tax. (Sections 6324 and 6901, Internal Revenue Code of 1954.) This liability of the beneficiary is not concerned with the levying and imposition of the tax, which is the concern of the treaty, but is only to ensure collection.

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